In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-267

GEORGE E. GIRARD, JR., AND
PAUL A. LAMBERT,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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GEORGE E. GIRARD, JR., AND
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

George E. Girard, Jr., and Paul A. Lambert petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on June 20, 1979.

Opinions Below.

The Court of Appeals for the Second Circuit issued an opinion, not yet reported, on June 20, 1979. The opinion is repro-

duced in the Appendix at pp. 1a-8a. Petitioners' motion to dismiss was denied by the District Court. The court's written opinion, dated February 3, 1978, and reported at 446 F. Supp. 890 (D. Conn. 1978), is reproduced in the Appendix at pp. 9a-27a.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 20, 1979. The original date for the filing of this petition, July 20, 1979, was extended by order of Mr. Justice Marshall to and including August 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented.

Whether, when construed to prohibit the dissemination of information recorded in government files, 18 U.S.C. § 641 is vague and overbroad on its face and penalizes a wide range of protected speech activities in violation of the First and Fifth Amendments to the Constitution of the United States?

Constitutional and Statutory Provisions Involved.

The First Amendment to the United States Constitution provides in pertinent part:

> Congress, shall make no law . . . abridging the freedom of speech, or of the press. . . .

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . ..

Title 18, United States Code, § 641, provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever, receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted —
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Statement of the Case.

Petitioners were convicted of the unauthorized sale of government property and of conspiring to sell such property in

violation of 18 U.S.C. §§ 641 and 371 (App. 2a). The property consisted of information on the computer files of the Drug Enforcement Administration (hereafter "D.E.A.") concerning four specific names provided to Girard by a government informer who had obtained the names from the D.E.A. agents for whom he was working as an informer (App. 2a-3a). Girard was also convicted of possession of cocaine with intent to distribute. At the time of the activities alleged — May, 1977, to July, 1977 — Lambert was a D.E.A. agent stationed in Washington, D.C., and Girard was a former D.E.A. agent living in Boston, Massachusetts.

The two primary government witnesses during the six and one-half week trial were James Bond, a paid government informer who had proposed a marijuana smuggling operation to Girard, and Michael Levine, a D.E.A. agent posing as an investor in Bond's smuggling operations.

In May, 1977, Bond met with Girard in Massachusetts and proposed the smuggling of marijuana from Mexico into the United States. According to Bond, Girard told him he could obtain information from D.E.A. files to determine whether any proposed participant in the operation was a D.E.A. informant. Bond then went to the D.E.A. offering to serve as a confidential informant — an offer which was accepted. In the course of setting up the "smuggling operation," Bond requested information from Girard on a Richard Lumiere — a totally fictitious individual concerning whom the D.E.A. had constructed a file in order to confirm Bond's allegations that Girard had told him he could obtain information from D.E.A. files.

On June 29, 1977, Bond and Girard met in New Haven, Connecticut, with agent Levine, who was posing as an investor in Bond's smuggling operation. Levine paid Girard

$500 for the Lumiere file check and offered to pay an additional $500 for a check on one Howard Fuchs.[1]

Girard provided Bond with information regarding Lumiere and Fuchs on July 9, 1977. On the evening of July 8, 1977, Lambert signed into D.E.A. headquarters in Washington, D.C., and on that same evening computer information about Richard Lumiere was requested by someone using a computer terminal located in Lambert's office complex.[2]

Subsequently, Levine provided Girard with two other names he wanted checked on the computer. Those names were checked from the same terminal located in Lambert's office and videotapes showed that Lambert had used the terminal at the time the names provided were being checked on the computer (see App. 3a).

The conviction on counts one and two of the indictment were based on the sale of this information.

Reasons Why the Writ Should be Granted.

This case presents this Court with an opportunity to clarify the constitutionally permissible reach of 18 U.S.C. § 641 — a statute originally designed to recodify a number of prior statutes penalizing the taking of concrete, tangible property

[1] Fuchs was a former D.E.A. informant known to Levine who was no longer being used by the D.E.A. He was allegedly to be checked in connection with what Levine told Girard was Fuchs' offer of a kilogram of cocaine for flying someone from Mexico to the United States. There was, in fact, no such offer and Agent Levine raised the subject of cocaine because Fuchs had smuggled cocaine in the past.

[2] Access to the four names provided by Bond and Levine was monitored by the D.E.A. through a system which indicated the date, time, and terminal used to obtain information from the computerized records concerning those names.

from the government, however accomplished. See, e.g., *Morrissette* v. *United States*, 342 U.S. 246, 265-269 (1952). In holding that the statute encompasses the sale or disposition, without authority, of information from government computer files, the courts below have, petitioners submit, expanded the scope of the statute beyond the limits permissible under the First and Fifth Amendments to the United States Constitution — an extension which should be reviewed by this Court.

The construction of 18 U.S.C. § 641 adopted below converts a statute otherwise confined to simple larcenous conduct into a catch-all covering any form of unauthorized transmission of information. In such form, the statute penalizes a broad range of speech activities of the type which have been jealously guarded by the First Amendment and is both vague and overbroad.[3]

Although invalidating a statute for overbreadth is "strong medicine" (*Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973)), it must be administered when necessary. A statute cannot survive First Amendment scrutiny unless it has been "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." *Garner* v. *Louisiana*, 368 U.S. 157, 201 (1961), Harlan, J., concurring and quoting *Cantwell* v. *Connecticut*, 310 U.S. 296, 311 (1940). *See also Edwards* v. *South Carolina*, 372 U.S. 229, 236 (1963); *Terry* v. *California State Board of Pharmacy*, 395 F. Supp. 94, 106 (N.D. Cal. 1975), *aff'd*, 426 U.S. 913 (1976).[4]

[3]Petitioners may raise the overbreadth challenge here even though their conduct might constitutionally be punished under a properly drawn statute, since "the statute's very existence may cause others . . . to refrain from constitutionally protected speech or expression." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612 (1973); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 380 (1977); *Grayned* v. *City of Rockford*, 408 U.S. 104, 114 (1972).

[4]The constitutional question can, of course, be avoided by conforming the statute to the fair import of its terms, which do not prohibit the dissemination of information. The statute would then be, as it was intended, an ordinary criminal law which would threaten First Amendment rights only in unique application. *Broadrick* v. *Oklahoma*, 413 U.S. at 613. The partial limitation on the broad sweep of the "dissemination of information" reading of § 641 found in certain Justice Department regulations by the court below does not, as will be discussed *infra*, adequately cure the deficiencies created by the broad construction adopted below.

In this case, the inclusion of information generally in the prohibitions of § 641 draws in clearly protected activity — disseminating information about the conduct of our government. The likelihood that such protected activities will be threatened by the statute is substantial, as is witnessed by the prosecution of Daniel Ellsberg and others. *See United States* v. *Russo*, No. 9373-(WMB)-CD (filed December 29, 1971), dismissed (C.D. Cal. May 11, 1973). *Cf. Landmark Communications, Inc.* v. *Virginia*, ____ U.S. ____, 98 S. Ct. 1535 (1978), where this Court was obliged to reverse a conviction under a state statute prohibiting dissemination of information about a judicial inquiry applied to a newspaper which published the results of confidential proceedings of the Judicial Inquiry and Review Commission.

It is also clear that the statute has not been narrowly drawn to define and punish specific conduct. Rather, it could be used to penalize *any* disclosure of information without regard to the type of information, its source or importance to the government, or the purpose for which it is disclosed. In essence, as construed below, it provides a blunderbuss weapon which could be used to prohibit disclosures which the government can have no legitimate interest in prohibiting, such as information embarrassing or incriminating government officials. It would encompass Senator Dole's disclosure of privileged communications concerning the Panama Canal. Indeed, it could even sweep within its purview the dissemination by any government officer of information obtained from un-

published government files during the course of his employment in his/her memoirs.

The construction of § 641 to encompass information as a "thing of value" also creates a statute which impermissibly encroaches on First Amendment freedoms by virtue of its extreme vagueness. Not only is it impossible to determine what types of disclosures are prohibited, but criminal liability is also made to turn on disclosure "without authority," without defining whose authority or the acceptable procedures for obtaining authorization. However, such a law "delegate[s] standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights." *Broadrick* v. *Oklahoma*, 413 U.S. at 613. *See also Hynes* v. *Mayor and Council of Oradell*, 425 U.S. 610 (1976), condemning a city ordinance prohibiting political canvassing without notification of the police department but without specifying the requisite procedures for notification.

Thus, however great the government's interest in preventing the disclosure of confidential investigative files, 18 U.S.C. § 641 is not narrowly drawn to serve that end.[5] As construed, § 641 neither restricts the application of criminal penalties to conduct which is not protected by the First Amendment nor provides any discernible standards for those who are entrusted with the task of determining which disclosures would be authorized and which would not. Here, as in *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976), the statute completely suppresses the dissemination of information and therefore intolerably burdens the flow of information essential in a democratic society. The construction of § 641 adopted by the courts below is, therefore, overbroad and must be invalidated.

[5] As demonstrated by 18 U.S.C. § 793(d) and (e) (statute governing dissemination of national defense information) and 5 U.S.C. § 552(a)(i)(1) and (3) (penalizing disclosure of information concerning individuals recorded in government files under the Privacy Act of 1974), when Congress has found governmental interests in protecting the confidentiality of information in its files to be threatened, it has drawn specific and narrow penal statutes addressed to the precise evil to be avoided.

"The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his [or her] contemplated conduct is forbidden by the statute." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). Due process requires specificity in criminal statutes, both to provide the citizen with a reasonable opportunity to know what is prohibited and to prevent arbitrary and discriminatory enforcement by providing explicit standards for those who must apply the law. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). A greater degree of specificity is required of statutes which affect activities in the sensitive area of First Amendment freedoms, since fear of criminal penalties may inhibit the exercise of those freedoms: "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Id.* at 109, quoting *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964). *See also Dombrowski* v. *Pfister*, 380 U.S. 479, 494 (1965).

Construed to include information recorded in the files of the government as a "thing of value," 18 U.S.C. § 641 provides no discernible guide for behavior and no standard for its application. The statute offers no means of determining what types of information will subject the disseminator to criminal liability — "information" is an extremely general term, and the statute provided no definition whatsoever of the types of data covered. Cf. *United States* v. *Diaz*, 499 F. 2d 113, 114 (9th Cir. 1974) (terms such as "ruin," "monument" and "object of antiquity" found too general to give warning of the nature of the objects it was unlawful to remove). The phrase "without authority" adds but another wholly undefined term to the

equation — a requirement of approval without notice of how it must be obtained or from whom to avoid the penalty. *See Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976), condemning an ordinance which required notification of the police without specifying the requisite means. *See also Terry* v. *California State Board of Pharmacy*, 395 F. Supp. 94 (N.D. Cal. 1975), *aff'd*, 426 U.S. 913 (1976). Here, as in the cases cited, the possible forms of conduct which would come within the undefined terms of the statute are so unimaginably large in number that one can only speculate as to which forms of behavior are prohibited.[6]

Since 18 U.S.C. § 641 provides no standard by which petitioners Lambert and Girard could determine whether their conduct was criminal or merely unethical, and provides no means but the test of prosecution by which those who seek to expose perceived evils or injustices in the workings of government may determine whether they can speak without fear of punishment, § 641 lacks the specificity required of a statute

[6] In holding that, construed to encompass information as a "thing of value", 18 U.S.C. § 641 was neither vague nor overbroad, the courts below relied on D.E.A. rules and regulations forbidding disclosure as "both a delimitation and a clarification of the conduct proscribed by the statute" (App. 5a; see also App. 26a-27a). However, these regulations do not purport to implement or construe § 641; indeed, they appear in an entirely different title of the United States Code. They simply cannot be considered determinative of whether the sweep of § 641 has been limited sufficiently to preclude criminal prosecutions of those who engage in protected speech activities or to assure those who propose to disseminate information about the government that their activities may be undertaken without fear of punishment. In any case, these narrowing regulations are addressed to the activities of Department of Justice personnel and provide no guidance to the scope of § 641's impact on the activities of persons, such as petitioner Girard, who are not members of an agency. *Cf. Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

which regulates First Amendment activities and, as construed below, must be declared void for vagueness.[7]

Conclusion.

As construed by the courts below, 18 U.S.C. § 641 violates both the First and Fifth Amendments to the United States Constitution. Accordingly, for all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[7] The statute is also vague as applied to petitioners Lambert and Girard, as well as vague on its face, even if their actions were to be regarded as "hard core" examples of the evil against which the statute is directed. Since absolutely no standard of conduct at all is specified, "[s]uch a provision simply has *no* core . . .. The language at issue is void for vagueness as applied . . . because it subjected [them] to criminal liability under a standard so indefinite that police, court and jury were free to react to nothing more than their own preferences." *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 556, 557—August Term, 1978.

(Argued January 18, 1979 Decided June 20, 1979.)

Docket Nos. 78-1191, 78-1292

UNITED STATES OF AMERICA,

Appellee,

—v.—

GEORGE E. GIRARD, JR., PAUL A. LAMBERT,

Appellants.

Before:

OAKES, GURFEIN, and VAN GRAAFEILAND,

Circuit Judges.

Appeal from judgments of the United States District Court for the District of Connecticut convicting both defendants after a jury trial before Daly, *J.*, of violating 18 U.S.C. § 641 and conspiring to violate it, 18 U.S.C § 371, and convicting defendant Girard on a third count of violating 21 U.S.C. § 841(a)(1).

Affirmed.

CHARLES NORMAN SHAFFER, Rockville, Md. (Shaffer & Davis, Rockville, Md., Peter I. J. Davis, of Counsel), *for Appellant Lambert.*

ROBERT F. COLLINS, Dorchester, Mass., *for Appellant Girard.*

RICHARD BLUMENTHAL, New Haven, Conn., United States Attorney, and Michael Hartmere, Assistant United States Attorney, District of Connecticut, *for Appellee.*

VAN GRAAFEILAND, *Circuit Judge:*

Appellants have appealed from judgments convicting them of the unauthorized sale of government property (18 U.S.C. § 641) and of conspiring to accomplish the sale (18 U.S.C. § 371). Appellant Girard also appeals from his separate conviction on a third count charging possession of cocaine with intent to distribute (21 U.S.C. § 841(a)(1)).

In May 1977, appellant Lambert was an agent of the Drug Enforcement Administration, and Girard was a former agent. During that month, Girard and one James Bond began to discuss a proposed illegal venture that involved smuggling a planeload of marijuana from Mexico into the United States. Girard told Bond that for $500 per name he could, through an inside source, secure reports from the DEA files that would show whether any participant in the proposed operation was a government informant. Unfortunately for Mr. Girard, Bond himself became an informant and disclosed his conversations with Girard to the DEA. Thereafter, dealings between Bond and Girard were conducted under the watchful eye of the DEA. Bond asked Girard to secure reports on four men

whose names were furnished him by DEA agents. DEA records are kept in computerized files, and the DEA hoped to identify the inside source by monitoring access to the four names in the computer bank. In this manner, the DEA learned that Girard's informant was Lambert, who obtained the reports through a computer terminal located in his office. The convictions on Counts One and Two are based on the sale of this information.

Section 641, so far as pertinent, provides that whoever without authority sells any "record . . . or thing of value" of the United States or who "receives . . . the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted", shall be guilty of a crime. Appellants contend that the statute covers only tangible property or documents and therefore is not violated by the sale of information. This contention was rejected by District Judge Daly in a well-reasoned opinion reported at 446 F. Supp. 890. We agree with the District Judge's decision and can do little more than harrow the ground he has already plowed.

Like the District Judge, we are impressed by Congress' repeated use of the phrase "thing of value" in section 641 and its predecessors. These words are found in so many criminal statutes throughout the United States that they have in a sense become words of art. The word "thing" notwithstanding, the phrase is generally construed to cover intangibles as well as tangibles. For example, amusement is held to be a thing of value under gambling statutes. *Giomi v. Chase,* 47 N.M. 22, 25-26, 132 P.2d 715, 716-17 (1942); *Hightower v. State,* 156 S.W. 2d 327, 328 (Tex. Ct. Civ. App. 1942); *State v. Baitler,* 131 Me. 285, 287, 161 A. 671, 672 (1932). Sexual intercourse, or the promise of sexual intercourse, is a thing of value under a bribery statute. *McDonald v. State,* 57 Ala. App.

529, 329 So. 2d 583, 587-88 (1975), *cert. denied*, 429 U.S. 834 (1976); *Scott v. State*, 107 Ohio St. 475, 485-87, 141 N.E. 19, 22-23 (1923). So also are a promise to reinstate an employee, *People ex rel. Dickinson v. Van De Carr; 87 App. Div. 386, 389-90, 84 N.Y.S. 461, 463-64 (1st Dep't 1963), and an agreement not to run in a primary election, People v. Hochberg*, 62 App. Div. 2d 239, 246-47, 404 N.Y.S. 2d 161, 167 (3d Dep't 1978). The testimony of a witness is a thing of value under 18 U.S.C. § 876, which prohibits threats made through the mails with the intent to extort money or any other "thing of value". *United States v. Zouras*, 497 F.2d 1115, 1121 (7th Cir. 1974).

Although the content of a writing is an intangible, it is nonetheless a thing of value. The existence of a property in the contents of unpublished writings was judicially recognized long before the advent of copyright laws. *Mazer v. Stein*, 347 U.S. 201, 214-15 (1954); *Wheaton v. Peters*, 8 Pet. 591, 657, 33 U.S. 591, 657 (1834); *Press Pub. Co. v. Monroe*, 73 F. 196, 199 (2d Cir.), *appeal dismissed*, 164 U.S. 105 (1896). This property was "not distinguishable from any other personal property" and was "protected by the same process, and [had] the benefit of all the remedies accorded to other property so far as applicable." *Palmer v. De Witt*, 47 N.Y. 532, 538 (1872). Although we are not concerned here with the laws of copyright, we are satisfied, nonetheless, that the Government has a property interest in certain of its private records which it may protect by statute as a thing of value. It has done this by the enactment of section 641. *See United States v. Friedman*, 445 F.2d 1076, 1087 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971) (transcript of grand jury proceedings). Section 641 is not simply a statutory codification of the common law of larceny. *See Morissette v. United States*, 342 U.S. 246, 269 n.28

(1952). Indeed, theft is not a requisite element of the proscribed statutory offense, which is based upon unauthorized sale or conversion. *United States v. Sher*, 418 F.2d 914, 915 (9th Cir. 1969). If, as the Court said in *Morissette, supra*, conversion is the "misuse or abuse of property" or its use "in an unauthorized manner", the defendants herein could properly be found to have converted DEA's computerized records.

The District Judge also rejected appellants' constitutional challenge to section 641 based upon alleged vagueness and overbreadth, and again we agree with his ruling. Appellants, at the time of the crime a current and a former employee of the DEA, must have known that the sale of DEA confidential law enforcement records was prohibited. The DEA's own rules and regulations forbidding such disclosure may be considered as both a delimitation and a clarification of the conduct proscribed by the statute. *See United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 576-79 (1973); *Adamian v. Jacobsen*, 523 F.2d 929, 932-35 (9th Cir. 1975). Where, as here, we are not dealing with defendants' exercise of a first amendment freedom, we should not search for statutory vagueness that did not exist for the defendants themselves. *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *Williams v. United States*, 341 U.S. 97, 104 (1951); *United States v. Swarovski*, 592 F.2d 131, 133 (2d Cir. 1979). Neither should we find a constitutional infirmity simply because the statute might conceivably trespass upon the first amendment rights of others. *Arnett v. Kennedy*, 416 U.S. 134, 158-64 (1974); *Colten v. Kentucky*, 407 U.S. 104, 110-11 (1972). In view of the statute's plainly legitimate sweep in regulating conduct, it is not so substantially overbroad that any overbreadth that may exist cannot be cured on a case by case basis. *See Broadrick v.*

Oklahoma, 413 U.S. 601, 615-16 (1973); *Arbeitman v. District Court*, 522 F.2d 1031, 1033-34 (2d Cir. 1975).

Appellants' remaining assertions of error require but brief comment. In Count Two of the indictment, appellants were charged with the unlawful sale and receipt of the records of four individuals. Appellants contend that this count was duplicitous in that it charged four separate offenses. *See* Fed. R. Crim. P. 8(a). The Government's position, on the other hand, is that the four sales were part of a single continuing scheme. The District Court did not abuse its discretion in permitting them to be treated as such. *Cohen v. United States*, 378 F.2d 751, 754 (9th Cir.), *cert. denied*, 389 U.S. 897 (1967).

The District Court likewise did not abuse its sound discretion in refusing to sever the trial of the two defendants. Where, as here, the crime charged involves a common scheme or plan, a joint trial of the participants is proper, absent a clear showing of prejudice. *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1144 (2d Cir. 1978); *United States v. Green*, 561 F.2d 423, 426 (2d Cir. 1977), *cert. denied*, 434 U.S. 1018 (1978). Appellants have made no such showing in this case.

We find no merit in appellants' contention that Girard's portion of a tape-recorded telephone conversation with Lambert was improperly admitted into evidence. On July 13, 1977, a meeting in a New Haven motel room between Girard, Bond, and an undercover DEA agent was tape-recorded with the knowledge and consent of Bond and the agent. During this meeting, Girard made a telephone call to Lambert in the presence of Bond and the DEA agent, and his conversation was of course recorded. Girard does not contend he had an expectation of privacy that would preclude Bond and the DEA agent from testifying as to what he said. *See United States v. Llanes*, 398 F.2d 880,

883-84 (2d Cir. 1968), *cert. denied*, 393 U.S. 1032 (1969). Under the circumstances, he cannot complain because his words were recorded with their consent. *United States v. Santillo*, 507 F.2d 629, 632-35 (3d Cir.), *cert. denied*, 421 U.S. 968 (1975).

Moreover, the telephone conversation played no part in the development of the Government's case against Lambert. Immediately following the recorded conversation, the government agents involved in the investigation were instructed not to attempt to identify the person with whom Girard was talking and not to use any information derived from the conversation in the course of their investigation. Testimony introduced during a six-day suppression hearing showed that Lambert was already the "chief suspect" as Girard's inside source at the time of the July 13 telephone call and that his activities were already being monitored. The District Court found that none of the Government's evidence against Lambert was tainted by the call, and that finding is supported by the proof. Under those circumstances, the District Court did not err in receiving the evidence as to Lambert, which was part of an ongoing investigation and not the "fruit of the poisonous tree". *United States v. Ceccolini*, 435 U.S. 268 (1978); *United States v. San Martin*, 469 F.2d 5, 8 (2d Cir. 1972), *cert. denied*, 410 U.S. 934 (1973).

Evidence of other conversations between co-conspirators which took place during the course of the conspiracy and in furtherance of it was clearly admissible. *United States v. Green*, 523 F.2d 229, 233 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976). The District Judge, in the exercise of his sound discretion, was entitled to place reasonable limits on the scope of appellants' cross-examination of the witness Bond. *See United States v. Carr*, 584 F.2d 612, 617 (2d Cir. 1978). Appellant Girard did not show any compelling and

legitimate need for calling an Assistant United States Attorney as a witness, and the District Court did not err in refusing to permit it. *United States v. Schwartzbaum*, 527 F.2d 249, 253 (2d Cir. 1975), *cert. denied*, 424 U.S. 942 (1976). Finally, we see no error in the District Court's charge.

The evidence was amply sufficient to support the judgments of conviction on all counts. Appellants' claims of procedural error are without merit. The judgments appealed from are affirmed.

United States District Court for the District of Connecticut.

CRIM. NO. N-77-98.

UNITED STATES OF AMERICA,
PLAINTIFF,

v.

PAUL A. LAMBERT,
DEFENDANT.

February 3, 1978.

Richard N. Blumenthal, U. S. Atty. for the District of Conn., New Haven, Conn. Asst. U. S. Attys., Michael J. Hartmere and Lawrence M. Herrmann, for plaintiff.

Peter I. J. Davis and Charles Norman Shaffer, Rockville, Md., for defendant.

Ruling on Motion to Dismiss.

DALY, District Judge.

Defendants have been charged in an indictment with violating 18 U.S.C. § 641 (1970),[1] a statute which establishes sanc-

[1] 18 U.S.C. § 641 (1970) provides:

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any de-

tions upon any person who "embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States . . .." The indictment alleges that the defendants sold information derived from a computer within the Drug Enforcement Administration, Washington, D. C. The information allegedly included the identity of possible informants and the status of government investigations into illegal drug traffic. Because only information rather than documents was transferred, defendant Lambert claims that § 641 is inapplicable. Furthermore, if § 641 is found to apply, the defendant argues that the statute is unconstitutionally vague and overbroad.

Section 641: Information as a "Thing of Value"

Defendant's specific contention is that the phrase "any record, voucher, money, or thing of value of the United States" encompasses only tangible objects, *e. g.*, a document embodying information rather than the information itself. Defendants point to the legislative history for support. The section appeared originally in the 1948 Revision, which recodified but did not alter the substantive offenses in the U. S. Code. There-

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partment or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted —

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

fore, the Court must first look to the section's legislative history prior to the 1948 revision.

Section 641 is a condensation of at least four sections in the 1940 Code, 18 U.S.C. §§ 82, 87, 100, 101. Section 82 referred to the larceny of "any property" of the government, or "any property which has been or is being made, manufactured, or constructed under contract." Section 87 referred to the theft of "any ordinance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States." Clearly, these sections refer to tangible goods. Sections 100 and 101, however, both referred to "money, property, record, voucher, or valuable thing whatever, of the money, goods, chattels, records, or property of the United States." Thus the mention of a "record . . . or thing of value" in § 641 can be traced to these two broadly worded sections, the language of which contrasts sharply with the more concrete references of §§ 82 and 87. Sections 100 and 101, in turn, descended from two sections of the 1909 codification, Act of March 4, 1909, ch. 321, §§ 47, 48, 35 Stat. 1097, 1098. The relevant phrasing in these latter sections is identical to the wording of the 1940 Code, as is the language of their predecessors, Act of March 3, 1875, ch. 144, §§ 1, 2, 18 Stat. 479.

Because the relevant statutory language has traveled through more than a century without substantive change, there is little recent legislative history to illuminate Congress' intent. In addition, the Congressional debates of 1875 fail to delineate the scope of the statutory language. Defendants therefore argue that the use of the word "record" in statutes contemporaneous with or prior to the original statute of 1875 should be examined. The defendants point to statutes dealing with the theft of court records, §§ 5394, 5403, 5408, (Rev. Stat. 1875); Act of February 26, 1853, § 4, 10 Stat. 170; Act of 1790, § 15, 1 Stat. 115, as proof that Congress meant to refer only to government documents, rather than to mere informa-

tion as well when legislating in 1875. This "matrix of judicial meaning", as the defendant calls it, is far too selective, and fails to account for the open-ended phrase "thing of value" in § 641 and its predecessors. This phrase evidences Congress' intent to cover a wide variety of conduct. However, the Court does not consider the legislative history conclusive as to the applicability of § 641 to the specific conduct alleged in this case. Further guidance must be sought from judicial interpretations of that section.

It has been contended that the transfer of mere information does not constitute a violation of § 641, because traditional tort law does not encompass such conduct. A similar conclusion was reached by the Ninth Circuit in the case of *Chappell v. United States*, 270 F.2d 274 (9th Cir. 1959), the continuing validity of which is in doubt.[2] In that decision, the Court of Appeals dismissed part of an indictment because the defendant's conduct did not constitute conversion under § 641. The defendant, a Master Sergeant in the U. S. Air Force, utilized an airman's labor while on duty to paint several apartments owned by the defendant. In the court's view, § 641 was merely a codification of common-law offenses, and under tort law conversion could only be performed upon tangible goods. As a result, the court termed the application of § 641 to the misappropriation of an employee's labor a "revolutionary concept", and invoked the need for strict construction of criminal statutes in finding § 641 inapplicable to the defendant's conduct. *Id.* at 278.[3]

This court sees no reason to restrict the meaning of § 641 to its common-law origins. In *Morissette v. United States*, 342

[2] *See United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971), discussed later in this opinion.

[3] Prior to the *Chappell* decision, the Sixth Circuit had applied § 641 to virtually identical facts without considering a "tangibility" limitation. *See Burnett v. United States*, 222 F.2d 426 (6th Cir. 1955).

U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), the Supreme Court interpreted § 641 as requiring a criminal intent, although the statute as worded did not explicitly refer to such a mental state. The respondents had argued that to "knowingly convert" did not require the same mental state as did the other common-law offenses listed in the statute. The Court rejected such a close equivalence between the statutory provision and earlier case law. In discussing the history of § 641, the Court concluded that the section applied to "acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Id.* at 269, n.28, 72 S.Ct. at 253. The relevant statutory predecessor to § 641 was similarly described by the Fifth Circuit in *Crabb v. Zerbst*, 99 F.2d 562, 565 (5th Cir. 1938), as covering "larceny, as well as any new situation which may arise under changing modern conditions and not envisioned under the common-law . . .." In particular, the Court of Appeals was concerned with the difficult relationship between common-law crimes, whose borders were indistinct, and the statutory language. Between the common-law offenses of embezzlement and larceny, the court wrote, "lies a gap which has grown wider and wider as the multifarious activities of the central government have spread and increased." *Id.* To fill this gap, Congress included the word "steal," a word "having no common law definition to restrict its meaning as an offense, and commonly used to denote any dishonest transaction whereby one person obtains that which rightfully belongs to another, and deprives the owner of the rights and benefits of ownership . . .." *Id.* A more flexible interpretation of § 641 than that found in *Chappell* is therefore appropriate.

In *United States v. Bottone*, 365 F.2d 389 (2d Cir.), *cert. denied*, 385 U.S. 974, 87 S.Ct. 514, 17 L.Ed.2d 437 (1966), the Court of Appeals interpreted a statute prohibiting the in-

terstate transportation of "any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted, or taken by fraud." 18 U.S.C. § 2314. The defendants had removed from corporate offices, *inter alia*, documents detailing a valuable organic chemical process. The documents were copied at another location and notes were made. Then the originals were returned. Only the copies and notes travelled through interstate commerce. The issue was whether the copies and notes were "goods" within the meaning of the statute. The court concluded that the copies and notes were included within the definition of "goods", reasoning that "where the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial."[4] *Id.* at 393-94.

Other courts have noted with approval the *Bottone* court's emphasis on the content of government documents, rather than their form. The district court in *United States v. Rosner*, 352 F.Supp. 915 (S.D.N.Y.1972), contrasted § 641 to 18 U.S.C. § 2071. The defendants were charged with removing certain papers, including Grand Jury minutes, from the files of the U. S. Attorney's Office in the Southern District of New York. The Government argued that it had been deprived of the full benefit of the temporarily removed documents in that

[4] However, the Second Circuit also noted in dicta that § 2314 would "presumably not extend to the case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only after a boundary had been crossed." *United States v. Bottone*, 365 F.2d 389, 393 (2d Cir. 1966). Thus the court indicated that the failure to reduce the information to writing might well have been a fatal flaw in a § 2314 prosecution. However, § 2314 includes narrower language than does § 641. The former provision refers to "goods", a statutory term clearly connoting tangibility.

the exclusivity of possession would have helped the prosecutor. *United States v. Bottone, supra*, was relied upon to overcome the fact that the documents themselves were returned unscathed after copies were made. Nevertheless, the court concluded that § 2071 did not apply because the documents were neither impaired nor destroyed. In dismissing the count brought under § 2071, the court noted that the Government would likely have met with greater success had the defendants been indicted for violating § 641, under which statute the transmission of the information contained in the documents might be considered as larcenous as the taking of the documents themselves. *Id.* at 922.

The most recent source of guidance as to the proper scope of § 641 is *United States v. DiGilio*, 538 F.2d 972 (3d Cir. 1976). In that case, the defendants were prosecuted for periodically copying FBI investigative records and selling them to the subject of the investigation. The Government contended that the deprivation of its exclusive possession of the contents of the investigative files was proscribed by § 641. The Third Circuit found such a conclusion unnecessary. Because copies were made during office time, with government machines, and on government paper, the court determined that the copies themselves were government property. The court cautioned that it "did not, by resting upon the narrower ground that a technical larceny has been proved, intend to imply a rejection of the government's broader interpretation of § 641." *Id.* at 978. The court also mentioned the apparent inconsistency between the Ninth Circuit's restrictive interpretation of § 641 in *United States v. Chappell, supra*, and the Supreme Court's discussion of that section's history in *Morissette v. United States, supra*. But the court declined to rule on the application of § 641 to the

theft of information, as opposed to documents, otherwise held exclusively by the government. *Id.*[5]

The only decision in which § 641 was applied to the theft of government information was *United States v. Friedman*, 445 F.2d 1076 (9th Cir.), *cert. denied sub nom., Jacobs v. United States*, 404 U.S. 958, 92 S.Ct. 326, 30 L.Ed.2d 275 (1971). The Government in that case alleged the transfer of secret Grand Jury transcripts in violation of § 641. The defendants were found guilty of copying portions of the transcripts without authority. In contrast to the situation in *United States v. DiGilio, supra*, the copies were made privately, therefore finding a technical larceny of government copying supplies was impossible. In the charge to the jury, the trial judge explained that under Rule 6(e) of the Federal Rules of Criminal Procedure the Grand Jury transcripts could not be released until authorized by the court. The judge then continued:

> The effect of said Rule is that information as to the questions asked and answers given at a particular session of the Grand Jury are the property of the United States and remain its property alone unless and until the release of said information is ordered by a court order. Said information is Government property regardless of who may be said to own the particular sheets of paper or tapes on which said information is recorded.

Id. at 1087. The Court of Appeals upheld this charge. However, the defendant's challenge to the trial judge's action was restricted to whether the charge removed the "authority" element from the jury's consideration.

[5] The Third Circuit mentioned that any prosecution for theft of government information, rather than of the documents themselves, would presumably rely on the "thing of value" language in § 641. *United States v. DiGilio*, 538 F.2d 972, 978 n.10 (3d Cir. 1976).

This Court agrees with the approach of the trial judge in *United States v. Friedman, supra*. In order for § 641 to realize the broad-gauge role articulated by the Supreme Court in *Morissette v. United States, supra*, and suggested by the statutory phrase "thing of value", it must be independent of the constraints, and the vagaries, of particular common-law doctrines. As *United States v. Bottone, supra*, teaches us, the content of a document may be more important than its original four corners. In fact, the defendant himself admits that government documents have little value apart from the information contained in them. The Government's brief describes well the importance of the allegedly stolen information:

> The property involved here, highly sensitive and confidential information maintained in computerized records, had a value only so long as it remained in the Government's exclusive possession. While so possesed, it was . . . a thing of extraordinary, incalculable value, something gained by the expenditure of countless man hours and other resources, capable of saving lives or, if misappropriated, severely jeopardizing them.

This Court sees no reason to restrict the scope of § 641 to the theft of government paper and ink, or to unauthorized reproduction. The phrase "thing of value" in § 641, in conjunction with the explicit reference to "any record", covers the content of such a record.[6]

[6] This Court does not mean to suggest by this holding that § 641 may cover the unauthorized oral transfer of government information not found in government records.

VAGUENESS AS APPLIED

Defendant Lambert argues that § 641 is unconstitutionally vague as applied to him given the Court's interpretation of the statutory phrase "thing of value" to include information derived from government records. The Due Process Clause of the Fifth Amendment requires that the language of a statute be precise enough to provide notice of prohibited conduct. A statute written in "terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). *See Smith v. Goguen*, 415 U.S. 566, 572-74, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939). "The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954). The issue thus is whether a person of "common intelligence" would "necessarily" wonder if his contemplated conduct were illegal.

The language of the statute provides significant guidance. The reference to "any record" clearly includes information held in a government computer data bank. The phrase "other thing of value" strongly suggests that something other than the particular records themselves, *i.e.*, the contents, are probably covered as well. Indeed, the distinction between a government "record" and its contents is rather fine. The individual of common intelligence would probably include the information held in a government computer in the statutory term "record" without reference to the catch-all phrase "thing of value." Furthermore, an investigation as to whether a statute is so vague as to "trap the innocent by not providing fair warning", *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972), must consider not only the statutory language, but also judicial interpretations of the statute and analogous legislation, *id.* at 110, 92 S.Ct. 2294; *Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). The judicial decisions discussed earlier constitute a supplemental form of notice that § 641 covers the conduct alleged in the indictment. This Court therefore holds that an individual planning the unauthorized sale of information held in a government data bank had sufficient notice that such conduct would be covered by § 641.

The Due Process doctrine of vagueness also requires that the terms of the statute be clear enough to prevent arbitrary and discriminatory enforcement by the prosecutor, the court, or the jury. *Smith v. Goguen*, *supra*, 415 U.S. at 572, 94 S.Ct. 1242; *United States v. Cohen Grocery*, 255 U.S. 81, 89, 41 S.Ct. 298, 65 L.Ed. 516 (1921); *United States v. Reese*, 92 U.S. 214, 221, 23 L.Ed. 563 (1876). However, the present case is not an example of Government's "unfettered discretion" in prosecuting on the basis of a statute so vague or of such broad applicability that "even handed administration of the law is not possible." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168, 171, 92 S.Ct. 839, 848, 31 L.Ed.2d 110 (1972). Nor is it the task of the jury in this case to give meaning to the statutory phrase "thing of value." The interpretation of § 641 suggested by the statutory language, supported by case law, proposed by the Government, and endorsed by this Court; provides a "reasonably ascertainable standard of guilt." *Herndon v. Lowry*, 301 U.S. 242, 264, 57 S.Ct. 732, 742, 81 L.Ed. 1066 (1932).

FIRST AMENDMENT JUS TERTII

Defendant Lambert argues that § 641 should be declared facially unconstitutional because it violates the First Amendment. The defendant does not allege interference with his own rights, and it is clear from the indictment that the alleged conduct was not constitutionally protected. Rather, he raises the claims of those not before this Court, as permitted by the First Amendment exception to the traditional rule of standing. *Contrast Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), *with United States v. Raines*, 362 U.S. 17, 21-22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960); *see also Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). This exception "is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972); *see Coates v. City of Cincinnati*, 402 U.S. 611, 619-20, 91 S.Ct. 1686, 29 L.Ed.2d 214 (White, J., dissenting). In particular, defendant claims that the blanket prohibition against unauthorized disclosures of government records and information is overbroad because it fails to indicate when disclosure is unauthorized, thus leaving to the jury the task of regulating the flow of information about government activity. The jury's freedom, the defendant continues, makes possible the punishment of constitutionally protected communication, and the prospect of such verdicts may deter those who might otherwise speak.[7]

[7] For a similar constitutional criticism of § 641, see Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 Stan.L.Rev. 311, 322-23 (1973).

Although the defendant challenges the statute for overbreadth, the statutory phrase "without authority" is also susceptible to attack for vagueness. In many cases, the doctrines of vagueness and overbreadth are distinguishable. The former, originally a due process doctrine, applies when the statutory language is unclear, and is concerned with notice to the potential wrongdoer and prevention of arbitrary or discriminatory enforcement. The doctrine of overbreadth, in contrast, is exclusively a First Amendment product, and usually applies when the statutory language is clear, but encompasses activities in which people have a right to engage without interference. However, in a suit challenging an ambiguously worded statute for infringing upon First Amendment rights, the doctrines blend. The same evils are addressed, *i. e.*, application of the statute's sanctions to protected activity and deterrence of others from engaging in similar conduct, and the same remedies are available, *i. e.*, a narrowing interpretation or facial invalidation. As a result, some courts have made no attempt to distinguish the two doctrines when measuring a statute against the requirements of the First Amendment. *See, e. g., Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972); *Cox v. Louisiana*, 379 U.S. 536, 551, 85 S.Ct 453, 462, 13 L.Ed.2d 471 (1965) (statute held "unconstitutionally vague in its overly broad scope"). Finally, both doctrines permit a court to invalidate a statute if one who has not participated in constitutionally protected activity can show that the discouragement of protected activity is "both real and substantial," and that the statute is not susceptible to a narrowing construction. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 59-61, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (vagueness); *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (overbreadth).[8]

[8] In *Young*, the Supreme Court referred to these criteria as a test of standing. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 59-61, 96 S.Ct.

In *Broadrick*, the Supreme Court explained that facial invalidation of an overbroad statute would be justified if the statute's illegitimate sweep was "substantial" in relation to the statute's proper applications. *Id.* Other courts, however, have inverted the test and declared that a statute is valid on its face if the number of proper applications are "substantial." *See, e. g., Arbeitman v. District Court of Vermont*, 522 F.2d 1031, 1034 (2d Cir. 1975); *Paulos v. Breier*, 507 F.2d 1383, 1386 (7th Cir. 1974). It is clear that the word "substantial" is no talisman. This Court considers a strictly quantitative interpretation of the *Broadrick* test inadvisable. Otherwise, a legislature could insulate large-scale interferences with First Amendment rights by embedding those restrictions in a regulatory framework of much broader applicability. The enormous variety of potential applications of the statute requires both the comparison of the government's interest in continuing to prohibit the non-protected activities covered by the statute with the First Amendment interest in avoiding the potential chill created by the statute, and the search for a judicial remedy designed to minimize the conflict.

Section 641 prohibits a large variety of possessory offenses. In relation to tangible items, the government's interest in preventing theft, and thus preserving its exclusive possession, is great. Equally important, the sweep of the statute is clear. Ownership of property is usually evident; at least an individual knows when property does not belong to him. More-

2440, 49 L.Ed.2d 310; *see Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). But the test does not prevent a party from raising the First Amendment claims and it does not relieve a court from considering them. However, once the claims of third parties have been raised, the test places a heavy burden on the party seeking invalidation of the statute to show that the statute deserves to be declared void on its face. The test thus concerns the requirements for *successfully* asserting the right of third parties. Otherwise the distinction between standing and success on the merits would be lost.

over, because property rights in tangible items are easily discerned, there is little confusion about when a transfer of possession is "without authority." In the realm of government records and information, however, there is no established common law of exclusive possession. In addition, the government's interest in secrecy must in every case be carefully balanced against the First Amendment interest in disclosure. Discussion of government affairs is the creative force of a pluralistic republic, and it constitutes the core activity protected by the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 14-15, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); *Whitney* v. *California*, 274 U.S. 357, 375-76, 47 S.Ct. 641, 71 L.Ed 1095 (1927) (Brandeis, J., concurring). "The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information. . . . [S]ecrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors." *New York Times Co. v. United States*, 403 U.S. 713, 724-25, 91 S.Ct. 2140, 2146, 29 L.Ed.2d 822 (1971) (Douglas, J., concurring). In order for discussion to be "uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), information about the government must be available. Although the Constitution does not impose on governments an affirmative duty to disclose information, *T. Emerson, The System of Freedom of Expression* 673 (1970), it does prohibit interference with not only the right to disseminate information, but also the right to receive it. *See, e. g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (prescription drug prices); *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 621 n.5, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976) (door-to-door solicitation for political causes); *Procunier* v. *Martinez*, 416 U.S. 396, 408-09, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (mail from prisoner); *Griswold v.*

Connecticut, 381 U.S. 479, 482, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (contraceptive information); *cf. Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969) (FCC's equal-time rule). And the interests protected are not merely those of the speaker and the audience, but those of society as a whole. *See, e. g., Bates v. State Bar*, 433 U.S. 350, 364, 97 S.Ct. 2691, 2696, 53 L.Ed.2d 810 (1977). By regulating the disclosure of government information, § 641 clearly touches a sensitive constitutional area. Therefore the need for definiteness is acute. Yet § 641 provides no greater guidance as to when disclosure is prohibited than it does in regard to traditionally recognizable possessory interests. Indeed, the statutory phrase "without authority" is virtually devoid of meaning when applied to the transfer of information.

This lack of content in the phrase "without authority" makes application of the overbreadth test difficult, for an examination of the statute's sweep, both legitimate and illegitimate, largely depends on the meaning of that phrase. The Court could interpret the phrase to mean "without express permission," but that would make illegal the disclosure of information of public interest that the government had no reason to keep secret, and had not meant to protect, but had merely overlooked. This would constitute a government pocket veto on disclosure unrelated to the significance of the information. The phrase also could mean, in the context of government employees, "only with the permission of one's superior." But this would punish subordinates who disclose information of public significance against the arbitrary orders of superiors who fear embarrassment. Numerous other interpretations are possible, and without guidance the jury would be free to construct its own test as to when disclosure of government information is punishable. Whether the problem

with the statute is termed overbreadth or vagueness, it is clear that the statute is susceptible to impermissible applications.

This Court considers substantial both the Government's property and security interests protected by the statute, and the statute's potential for deterring constitutionally protected speech. Facial invalidation is "strong medicine," *Broadrick v. Oklahoma, supra*, 413 U.S. at 613, 93 S.Ct. 2908, because it necessarily involves the sacrifice of one important interest to further another. In the present case, no such sacrifice is necessary because a narrowing interpretation is possible. In *Arnett v. Kennedy*, 416 U.S. 134, 162, 94 S.Ct. 1633, 1648, 40 L.Ed.2d 15 (1974), the Supreme Court rejected an overbreadth challenge to a federal statute that permitted the dismissal of employees "for such cause as will promote the efficiency of the service," by declaring as a general rule that the statute did not apply to constitutionally protected expression. Here, there is also no indication that Congress meant to prohibit constitutionally protected disclosures. But because the statute in this case involves criminal sanctions, the language of the statute must be further defined, and the scope of the statute reduced. The solution is to interpret § 641 alone as neither authorizing nor prohibiting the transfer of particular types of information. The section must be read as merely establishing a penalty for the violation of other, more particular, prohibitions against disclosure. Thus, the jury may consider only transfers of information affirmatively prohibited by other federal statutes, administrative rules and regulations, or, perhaps, longstanding government practices. Because the network of restrictions on the disclosure of government information is complex, no government-wide validation or invalidation of § 641 is possible or appropriate. Constitutional challenges to this statute must be considered on a case-by-case basis in light of the particular type of information involved and the character of the prohibition against disclosure. This does not mean that further review of § 641's chilling effect on

First Amendment activities must be restricted to an examination of the government controls "as applied" to the particular defendant. Rather, the various statutes and regulations dealing with confidential government information may still be challenged on their face, but only when relevant; the existence of § 641 will mandate careful scrutiny.[9]

Justice Department regulations prohibit the improper use of official information that has come to an individual by reason of his status as a Department of Justice employee and which has not become part of the body of public information. 28 C.F.R. § 45.735-10 (1977).[10] The Agents Manual of the Drug Enforcement Administration further particularizes when a disclosure of information is improper. *Cf. Adamian v. Jacob-*

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[9]The issues before future courts in § 641 prosecutions involving First Amendment defenses will be numerous. These courts will have to deal with questions such as the right of the jury to consider "custom and usage," rather than explicit statutory or regulatory guidelines, as an affirmative prohibition invoking § 641 sanctions, *cf. Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 n.6, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976); *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439, 754 (1974), and the feasibility of seeking an authoritative interpretation of the particular regulatory prohibition prior to engaging in arguably protected activity, *cf. Buckley v. Valeo*, 424 U.S. 1, 40, 96 S.Ct. 612, 46 L.Ed2d 659 (1976); *Arnett v. Kennedy*, 416 U.S. 134, 160, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). The myriad constitutional problems involved in another context — the regulation of sensitive defense information, are discussed in Edgar & Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L.Rev. 929 (1973). *See generally M. Halperin & D. Hoffman, Freedom v. National Security* (1977).

[10]*See also* 28 C.F.R. § 45.735-13 (1977) (Misuse of official position and coercion); 28 C.F.R. § 45.735-18 (1977) (Conduct prejudicial to the Government). Congress has granted to the heads of the various departments authority to restrict access to government information, 5 U.S.C. § 301, through means consistent with the requirements of the Freedom of Information Act, 5 U.S.C. § 552. The Attorney General, in addition to promulgating department-wide regulations, has delegated to division heads the authority to issue supplemental and implementing regulations. 28 C.F.R. § 45.735-28 (1977). At the time of the alleged offenses, defendant Lambert was an employee of the Drug Enforcement Administration in Washington, D. C.

sen, 523 F.2d 929, 934-35 (9th Cir. 1975). A "breach of integrity" is defined to include "[p]roviding official information to any person known or suspected to be involved in the narcotic or drug traffic . . .." § 6123(C). "Official information" includes identification of investigative sources or targets, and the identity of undercover agents. § 6123(C) (1), (2), & (4). Disclosure of information held in the computerized records of the Narcotics and Dangerous Drugs Information System (NADDIS), from which the information in this case was allegedly taken, is subject to a complex set of rules. *See* § 6142.1 *et seq*. The "disclosure of information" is defined as "the release to a non-DOJ [Department of Justice] person or agency of any item of information that includes either the name of an individual or any number of identifying item, such as a finger or voice print, by which the individual may be subsequently identified," and the release of information includes oral disclosures. § 6141.2(C). Disclosure is permitted only under certain conditions, and is generally based on a demonstrated need to know, taking into consideration the needs of law enforcement agencies, other departments, Congress, and the Courts. To the extent relevant, provision is made for disclosures to members of the general public under The Privacy Act, 5 U.S.C. § 552a, and The Freedom of Information Act, 5 U.S.C. § 552. However, an agent is not authorized to release information to the general public. These rules are specific and carefully constructed to take into consideration the government's interest in law enforcement and the right of various groups to government information. The risk that these rules might interfere with constitutionally protected activity is minimal at best. Therefore these provisions are neither vague nor overbroad on their face.

Accordingly, the motion to dismiss is hereby DENIED.